Queensland Bar Association

Annual Conference 2018

Access to Justice

Address

by

Wayne Martin AC

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The Traditional Owners

I would like to commence, as I always do, by acknowledging the traditional owners of the lands on which we meet, the Turrbal people, and by paying my respects to their Elders past and present and acknowledging their continuing stewardship of these lands.

The Queensland Bar

I am greatly honoured to have been invited to address this annual conference of the Queensland Bar Association and thank the Queensland Bar for its generous hospitality. The welcome I have received on this and my more recent visits to Brisbane has been significantly warmer than the reception I received when I came to Brisbane to appear in the Federal Court after my appointment as Chief Justice of Western Australia had been announced, but before I took up that appointment. An injunction was sought to restrain me from appearing. I was lucky enough to receive the benefit of the services of Walter Sofronoff QC, as his Honour then was, and Justice Greenwood refused the injunction in a decision which is now regarded as defining what can and what cannot be done between announcement and judicial appointment. But I digress.

Access to Justice

In the period of almost 12 years since my appointment, I have delivered more than 15 public addresses on the subject of access to justice and related topics, and spilt ink over almost 400 pages dealing with the same topic.[1] I do not mention these figures in order to boast of prolixity or

[1] Which are published on the website of the Supreme Court of Western Australia, <www.supremecourt.wa.gov.au> (accessed 23 February 2018).

circumlocution, or to reveal an indecent obsession with the topic but rather to provide tangible evidence of how important I regard the topic which has been chosen for your conference.

Access to Justice - meaning

The expression 'access to justice' is used by a wide variety of people in a wide variety of contexts in order to convey a wide variety of different meanings. The expression can be, and is, used in at least four different contexts. The first is in the context of the civil justice system where the emphasis is on the word 'access' and in particular upon the many barriers to access experienced by many Australians. Next, in the criminal justice context, the emphasis is more on the word 'justice' than upon access, and the issues connoted relate more to the extent to which the criminal justice system discriminates against or differentially treats different groups within our community, including different ethnic and cultural groupings, women, those with differing sexual orientations, those with mental illness or disability and so on.

The third area in which the expression is sometimes used relates to public engagement with the justice system. In that context, the expression encompasses issues with respect to transparency and comprehensibility.

The fourth context in which the expression is sometimes used arises from the increasingly multicultural characteristic of the Australian population. In that context, the expression relates to the extent to which cultural and linguistic barriers impede meaningful access to the justice system for a significant proportion of our population.

Access to Civil Justice

In this paper I will address only the first context I have identified - namely the context of access to civil justice. This is not to suggest that the other

contexts in which the expression is used are any less important - to the contrary, I have spoken and written at length about access to justice in each of these areas.[2] Rather, my selection has been made because of limitations of time and space.

It should not be thought that there is anything novel about barriers to access to civil justice. More than 100 years ago, in 1906, Professor Roscoe Pound, the Dean of Harvard Law School, published a paper entitled 'The Causes of Popular Dissatisfaction with the Administration of Justice'.[3] The opening sentence of his treatise was:

> Dissatisfaction with the administration of justice is as old as law itself.

He wrote then of the three major barriers to access in the civil justice system - namely, cost, delay and complexity- which remain the major barriers to access. They were also central to Charles Dickens' withering description of the Court of Chancery in the 19th century in *Bleak House*.[4]

Some Tortured Metaphors

The Rolls Royce

Over the years I have tortured a number of metaphors in an attempt to create an image of the barriers to access in the civil justice system. I have described that system as analogous to a Rolls Royce, because it is the best system money - a lot of money - can buy. It is very good at leaving no stone unturned in gathering evidence or potential evidence, and in allowing every legal issue - good, bad or indifferent - to be ventilated and determined. But if you cannot afford that degree of luxury, it is a bit like owning a Rolls Royce when you cannot afford to put the petrol in it. You can admire it, boast about it, polish it, take pride in its ownership and show

[2] In various papers published on the website of the Supreme Court of Western Australia, <www.supremecourt.wa.gov.au> (accessed 23 February 2018).
[3] Presented at the annual convention of the American Bar Association in 1906.
[4] Dickens C, *Bleak House* (Bradbury & Evans, 1852-1853).

it to people, but you cannot use it to perform its fundamental function, which is to take you from one place to another.

The Club Sandwich Class

Another metaphor I have used arises from the fact that the greatest barriers to access in Australia are faced by those who are neither very rich nor very poor. The very rich can afford legal representation. The very poor, if charged with a serious criminal offence, will be given legal aid. In very restricted circumstances, those with limited financial means may be assisted in civil matters, but the assistance is largely limited to family disputes. The group in between these two economic extremes has been described as 'the sandwich class', but, in fact because the group represents a significant majority of Australians, I think is more accurately described as the 'club sandwich class'.

Unmet Legal Need

The Legal Australia-Wide Survey[5] has provided very important information with respect to the extent of unmet legal need. The survey revealed that 50% of Australians aged 15 years and over need legal help every year.[6] Some 22% of those surveyed across Australia experienced three or more legal problems within the past 12 months.[7] The Indigenous Legal Needs Project has also demonstrated that access to legal assistance for Indigenous Australians is particularly limited.[8] The Centre of Innovative Justice at

[5] Coumarelos C, Macourt D, People J, McDonald HM, Wei J, Iriana R and Ramsay S, *Legal Australia-Wide Survey: Legal Needs in Australia* (Law and Justice Foundation of New South Wales, August 2012) <http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf > (accessed 26 February 2018).

[6] Ibid xiv, 59 and 161.

[7] Ibid xiv and 59.

[8] The Indigenous Legal Needs Project was a national research project conducted from 2012-2014 to identify the non-criminal legal needs of Indigenous Australians, and to provide an understanding as to how legal services may work more effectively to address the identified needs. The project culminated in reports for each state, such as Allison F, Schwartz M and Cunneen C, *The Civil and Family Law Needs of Indigenous People in Western Australia* (James Cook University, 2014)

RMIT University in Melbourne has also provided very important information with respect to unmet legal need in Australia in a report published in 2013.[9] Drawing upon these various sources of information helps us to identify the major areas of unmet legal need, other than in criminal law. The areas in which unresolved legal problems commonly arise include:

- Family law;
- Employment law;
- Personal injury law;
- Consumer rights law;
- Welfare law;
- Housing and tenancy law; and
- Migration law.

It will immediately be observed that these areas of legal need correspond closely to activities and characteristics that are at the very core of our human existence including our familial relationships, employment, the capacity to reside in the country of our choice, the dwelling in which we live and the wherewithal we need to put food on the table.

Is the legal profession greedy?

There is a very common view to the effect that the reason there is such a gap between legal need and legal service delivery is the greed of the legal profession. That view is influenced by the perception that mega-firms charging extraordinary hourly rates housed in opulent buildings with marble foyers on floors which are so high they offer panoramic views to New Zealand, with white-coated baristas offering quality coffee to all clients are

<https://www.jcu.edu.au/indigenous-legal-needs-project/resources/ilnp-reports-and-papers> (accessed 26 February 2018).

[9] Centre for Innovative Justice, *Affordable Justice - A Pragmatic Path to Greater Flexibility and Access in the Private Legal Services Market* (RMIT University, October 2013) <http://mams.rmit.edu.au/qr7u4uejwols1.pdf> (accessed 26 February 2018).

characteristic of the legal profession as a whole, and that high flying commercial barristers are characteristic of the bar as a whole. The authors of the RMIT report to which I have just referred analysed how closely those images correspond to reality. They found that of the lawyers working in Australia, those employed in large firms or who were partners in large firms represent about 20% of the private profession; those working in partnerships with two to four partners another 20%; sole practitioners 37%; barristers 5% and of the barristers, Senior Counsel are about 20% of the bar or 1% of the legal profession. The reality is that more than half of the lawyers working in Australia today operate in practices the size of which suggest that they are aiming to provide services for that 'club sandwich class' or what might be called middle Australia. The reality is that the cost of their services still places them out of the reach of a lot of people within that class. I will come back to the reasons for that later in this address.

The Rule of Law

Of course, these barriers to access, and large areas of unmet legal need, have serious implications for a society which takes pride in being governed by the rule of law. The rule of law becomes an abstract concept of no practical utility to the significant proportion of our population which has no meaningful access to the civil courts in order to enforce legal rights and obligations.

Attempts to Breach the Gap

Various mechanisms have evolved in an attempt to breach the yawning gap between the need for legal services and the capacity of those in need to afford those services. In the following section I will briefly review those mechanisms.

Legal Aid

The legal aid commissions, Aboriginal legal services, and family violence services around Australia do their best with the limited resources made available to them. However, those resources are meagre and in real terms appear to be diminishing over time, notwithstanding recommendations from the Productivity Commission and the Law Council of Australia proposing increases in annual funding of $200 million.[10] Government expenditure on legal aid in Australia, assessed per capita, is a fraction of that spent in the United Kingdom.[11] The net result is that generally speaking, legal aid is only available in serious criminal matters and a relatively small proportion of family law matters. Apart from those family law cases, legal aid is generally unavailable for civil cases.

Community Legal Centres

Community legal centres provide a vital first port of call for those who have a legal problem and no other means of finding a solution to that problem. They are located within, accessible to, and responsive to the needs of the communities which they serve. Prevention, in the form of community education with respect to steps and practices which can be taken to avoid disputes in the first place, and early intervention to prevent disputes from escalating are, in my view, vital aspects of any strategy to reduce the extent of unmet legal need. CLCs are very well placed to implement these components of such a strategy. However, they have also been subjected to significant funding constraints and have been forced to rely increasingly upon the services of volunteers, some of whom lack legal training.

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[10] Law Council of Australia, *2018-2019 Pre-Budget Submission* (31 January 2018); Productivity Commission, *Access to Justice Arrangements* (December 2014).

[11] Timms P, *Legal Aid Matters: Lack of Government Funding 'Destroying Lives' Law Council Says* (ABC News, 16 May 2016) <http://www.abc.net.au/news/2016-05-16/law-council-of-australia-launches-legal-aid-matters-campaign/7417094> (accessed 26 February 2018).

Pro Bono Services

Estimates of the amount of pro bono services provided by the legal profession around Australia vary, although all estimates show that contribution to be significant. A recent report from The Australian Pro Bono Centre estimated that between 2007 and 2017 Australian lawyers gave almost three million pro bono hours of service to the community (which equates to at least 35 hours - or one week - per lawyer), with just over 420, 000 of those hours being provided in the 2016-7 financial year.[12] The provision of these services is, of course, laudable, and it is regrettable that their provision goes largely unsung. However, the magnitude of unmet legal need in Australia is such that pro bono services are never likely to make a significant reduction in its extent.

Litigation Funding

The commercial market in litigation funding has grown in extent and diversity over the last 20 years or so. However, the business models for commercial funders generally result in them mainly being interested in very substantial cases and class actions - usually on behalf of shareholders or investors. Unless the damages awarded are likely to be sufficient to generate the margins which their business models require to enable them to trade profitably, they will not become involved. I do not mean to suggest that litigation funding is not a significant component of the mechanisms which do reduce the extent of unmet legal need, but, as with pro bono services, the extent of the reduction which litigation funding brings about will be constrained by the realities I have identified.

[12] Australian Pro Bono Centre, *10th Annual Performance Report of the National Pro Bono Aspirational Target* (October 2017).

Legal Assistance Funds

In some jurisdictions, funds have been set up, from a variety of sources, which provide funding for legal expenses incurred in a limited number of cases, on the basis that the funds will be replenished from successful outcomes in those cases. Because the size of the funds are relatively modest, the number of cases which are funded is equally modest.

Legal Expenses Insurance

There are a number of types of legal expenses insurance available in different parts of the world including, to a somewhat limited extent, Australia. The systems can be classified in the following way:

(a) add on cover;

(b) pre-paid legal expenses;

(c) stand-alone cover;

(d) after the event insurance.

Add on Cover

This type of cover is provided as an add on to a policy primarily provided for another purpose - such as a household policy or a motor vehicle policy. The policies provide cover for legal expenses incurred as a result of, for example, a motor vehicle accident or an occupier's liability claim against a householder.

Pre-paid Legal Expenses

Under these schemes, an organisation such as a union will make an arrangement with a law firm for the provision of legal services which are paid for by the first organisation. So, for example, legal advice might be provided to union members in relation to specified areas of law - such as,

for example, personal injury. Although there have been schemes of this kind operating successfully in Australia, their impact is limited.

Stand Alone Cover

Under these policies, cover for legal expenses can be provided in return for a premium in advance of the need for legal advice arising. A scheme of this kind operated in New South Wales between 1987 and 1995, although it ultimately closed. One of the economic difficulties for such schemes is that the people who take out cover are likely to be the people who are at significantly higher risk of needing legal advice, thus jeopardising the financial stability of schemes of this kind. However, insurance of this kind has proved successful elsewhere - for example, in Germany millions of policies of this kind are written each year, and cover of this kind is also widely utilised in the United States. However, the types of legal issues for which advice is covered by the policy are often quite limited.

After the Event Legal Expense Insurance

This type of insurance is prominent in the United Kingdom. When litigation is commenced, the policy will be taken out to cover the cost of the legal services involved in conducting the litigation. The premium will customarily be about 40% of the anticipated expenses. If the litigation is unsuccessful, the insurer will pay the legal fees and, under some policies, also any costs order made against the insured. In the United Kingdom these schemes are often written by the solicitors themselves as agents for the insurers. In commercial terms they perform a function which is not dissimilar to litigation funding.

Legibank

From time to time, universal legal expenses schemes, funded by government, have been mooted - a kind of 'Legibank' or 'Legicare' if you

like. Given diminishing government enthusiasm for funding legal aid and CLCs, there is no prospect that any such scheme would ever get off the ground in Australia.

Fee Uplift Schemes and Contingency Schemes

In Australia, schemes under which a lawyer takes a percentage of the return from the litigation by way of a fee are generally unlawful. However, variants on this type of funding arrangement, such as fee uplift schemes, under which the practitioner agrees that in the event that the case is lost, no fee will be rendered, but in the event the case is won, the fee rendered will be a multiple of the fee normally charged, are acceptable in a number of jurisdictions. These schemes appear to me to be preferable to the contingency arrangements of the kind that operate in the United States, in that the practitioner's reward for success is determined by reference to the amount of work done - that is to say, the extent of the commercial risk borne by the practitioner, rather than by reference to the proceeds of the litigation. However, the Productivity Commission and the Victorian Law Reform Commission have each recommended that consideration be given to lifting the prohibition on contingency fees, subject to conditions. In Australia, no win no fee arrangements are relatively common in relation to personal injury claims, but have not made a significant contribution to meeting unmet legal need in other areas.

Bridging the Gap - Summary

This brief summary of the various mechanisms that have emerged in an attempt to reduce the extent of unmet legal need in Australia reveals a mosaic with many tiles missing. Although each of these mechanisms does make a contribution, none of them alone, nor all of them in combination, have significantly ameliorated the practical barriers which many Australians encounter when they endeavour to access our civil justice system.

Improving Access - Court Diversion

Although I will shortly address the ways in which we might improve access to justice by improving the efficiency of our courts, there will always be limits upon the extent to which improvements in efficiency can bring our courts within the economic reach of all Australians. In this section of my address I will touch upon the ways in which diversion away from the courts can improve access to justice, in the broader sense of that expression.

Encourage Consensual Resolution

The overwhelming majority of disputes which arise in our community are resolved by agreement or consensus. Those disputes which require some other mechanism for resolution represent only a very small fraction of the total number of disputes which arise in a complex community. The value attached to consensual resolution appears to vary as between cultures so that, for example, in Japan the failure to resolve a dispute by agreement involves a loss of face for all concerned. By contrast, in countries like the United States and Australia, the last 50 years or so has seen increasing resort to litigation, and ever earlier in the life of any dispute. I would hope that the increasing use of mediation would encourage parties to a dispute to themselves consider ways in which they might achieve agreement without having to involve a third party, such as a mediator - encouraged perhaps by public education programmes conducted by CLCs or consumer advice services.

Prevention and Early Intervention

I have already touched briefly upon the significance which I attach to prevention and earlier intervention. By prevention I mean to include such things as improving the level of information available to the public in relation to prudent steps which might be taken to avoid a dispute - especially in high volume areas like consumer disputes, landlord and tenant

disputes, welfare disputes, dividing fence disputes, employment disputes, etc. By early intervention I mean to refer to the giving of prompt advice with respect to legal rights and obligations and as to the informal mechanisms which might be available for the resolution of a dispute before it escalates to the point where more formal mechanisms are required. As I have already mentioned, it seems to me that CLCs and government agencies with responsibilities in the areas of unmet legal need I have mentioned might perform important roles in this regard. The internet provides unprecedented opportunities to provide detailed information with respect to legal rights and remedies in a variety of user friendly formats to a broad section of the community. This is a topic to which I will return.

Industry and Government Ombudsmen

In all Australian jurisdictions ombudsmen have been appointed by government and by industries which generate significant volumes of disputes in order to resolve disputes informally and as expeditiously as possible. The numbers of disputes resolved each year by, for example, the banking and telecommunications ombudsmen vastly exceed the number of disputes referred to courts. Although the numbers involved would appear to make it impractical for the ombudsmen to give the some level of consideration to each dispute as would be given by a court, ombudsmen are much more accessible than courts, in a practical sense.

ADR - Mediation

One of the dominant trends emerging in the civil justice system over the last few decades has been the increasing emphasis on alternative systems of dispute resolution in general, and mediation in particular. This is not the place for a detailed analysis of the relative strengths and weaknesses of

mediation as compared to adjudication.[13] It is sufficient to say that in many courts, including the Supreme Court of Western Australia, mediation is now the dominant means by which cases are resolved. Although we are still developing our understanding of the identification of the most propitious time at which to refer cases to mediation, the emerging trend suggests that the earlier the better, and that mediation should be regarded as a process rather than an event. The effectiveness of mediation as a dispute resolution mechanism, and the favourable response which increasing emphasis on mediation has received from parties to disputes suggests to me that the further development of mediation provides one of the greatest opportunities for meaningful improvements in access to justice.

Of course I do not mean to suggest that experienced lawyers should be asked to set aside a day in the mediation of relatively minor disputes. What I do suggest is that, consistently with the principles of proportionality which are now embraced by courts with developed case management systems, forms of mediation which are proportional to the significance and character of the dispute are evolving and can be matched to any particular dispute. So, while a retired High Court judge may be an appropriate mediator in a commercial case involving many millions or perhaps billions of dollars, at the other end of the spectrum, online or virtual mediation, perhaps through a chat room, may well be the most convenient and suitable mechanism and are now widely used to resolve consumer disputes in many jurisdictions. Differing levels of formality can be applied to mediating the range of cases between these ends of the spectrum.

[13] Those interested in this topic could see my paper *Managing Change in the Justice System*, 18th AIJA Oration, 2012 available at: <http://www.supremecourt.wa.gov.au/_files/AIJA_Oration_%20Managing_Change_in_the_Justice_System_Martin_CJ_Sept_2012.pdf> (accessed 24 February 2018).

ADR - Arbitration

Arbitration is another form of alternative dispute resolution. It is fundamentally different in character to mediation, because it involves, in effect, private adjudication. Because of that it suffers many of the same barriers as curial adjudication. Recent experience suggests that, if anything, arbitration can be more expensive because of the need to pay the entire cost of the adjudicator(s).

However, this is not to say that systems of informal cost effective arbitration could not be developed for high-volume low-value disputes, and a number of industries have developed such systems in North America for resolving consumer complaints. Such systems are contentious, as consumer advocates assert that they are structured so as to favour the supplier over the consumer. However, they have been enforced, and litigation stayed, by the Supreme Courts of the United States and Canada. In Canada, that is unless a statutory right with a public interest is involved. Some provinces in Canada have prohibited consumer arbitrations, because of perceived imbalance.[14]

Administrative Tribunals

Another significant feature of the civil justice system over the last few decades has been the exponential increase in the jurisdiction of administrative tribunals. In a number of Australian jurisdictions, the caseload of such tribunals is not dissimilar to the civil caseload of a major court. In some States, tribunals have a Small Claims jurisdiction involving disputes between private parties, and in many States disputes between landlord and tenant, or between builder and client, are referred to such tribunals. Because of the emphasis which such tribunals place upon

[14] See the discussion of arbitration in North American business-consumer disputes in Garnett R, *Arbitration of Cross-Border Consumer Transactions in Australia: A way forward?* (2017) 39(4) *Sydney Law Review* 569. Ontario and Quebec have prohibited consumer arbitrations, and in Alberta they are permitted with ministerial consent.

informality and flexibility of procedure, they tend to be significantly more accessible than courts. In some of these tribunals, legal practitioners are not permitted to appear. It is I think open to debate whether such restrictions enhance or inhibit access to justice.

Pre-action Protocols

In a number of jurisdictions, including all major Commonwealth jurisdictions, prospective litigants are required to comply with a number of requirements before invoking the jurisdiction of the court. The content of those requirements varies, but generally focuses upon good faith endeavours to resolve the dispute. Such empirical analysis as has been undertaken in respect to such measures, and anecdotal experience, suggests that it is by no means clear that the requirement to expend time and money in satisfying those requirements enhances rather than diminishes access to justice. No doubt individual views on the desirability of such protocols will vary, but the range of views I have seen suggests that the jury may still be out on this question.

Improving Access to Justice by Improving Court Efficiency

In this section of my address I will deal with the extent to which access to justice might be improved by improving the efficiency of our courts thereby reducing the time taken to resolve the dispute, and the cost to the parties.

Case Management

Another dominant characteristic of civil litigation over the last few decades has been the emergence of proactive case management by judicial officers. Many courts have abandoned the traditional approach under which the pace and progress of each case was essentially left to the enthusiasm (or whim) of the parties and their legal representatives. Rather, the pace at which the case travels is set by the case manager, in consultation with the parties. The

objective of the process is to bring the case to resolution, either by agreement or by trial, as quickly and as cheaply as possible.[15] That objective is fostered by the use of an individualised approach in each case, rather than the previous adoption of a one size fits all approach under which virtually all cases followed precisely the same procedural route.

Early Issue Identification

One of the principal objectives of case management is to enable identification of the real issues between the parties at the earliest possible opportunity. Many courts have moved away from the assumption that the process of formal pleading is the best way of identifying the issues, in favour of other less formal and more flexible techniques.

Strategic Conferences

A technique used in the Supreme Court of Western Australia to facilitate the early identification of issues is a procedure which we have coined a 'strategic conference'.[16] It is held relatively early in the life of cases managed by judges, and involves the parties and their legal representatives meeting with the judge in a conference room, rather than in an adversarial environment. The purpose of the meeting is to identify the real issues in the case, to discuss the timing of mediation, the minimum steps required before meaningful mediation can take place, and to chart the procedural course which the case will follow.

We have found that a procedure of this kind has at least two distinct advantages. First, it facilitates movement away from the 'one size fits all' approach whereby the parties and their legal advisers mechanically apply, without discerning thought, the traditional processes of pleading,

[15] *Rules of the Supreme Court 1971* (WA) O 1 r 4B, O 4A; Supreme Court of Western Australia, Consolidated Practice Directions 4.1.
[16] *Rules of the Supreme Court 1971* (WA) O 4A r 14A; Supreme Court of Western Australia, Consolidated Practice Directions 4.1.2 [11]-[20].

particulars, discovery, exchange of witness statements, exchange of expert evidence, etc.

The second advantage is that the charting of a procedural course at the outset of the case can have the effect of reducing the number of subsequent appearances required - especially if the parties and their lawyers adhere to the charted course, thereby reducing cost.

Reduced Adversariality

One of the dominant characteristics of the common law system we inherited from our colonial forebears is its adversarial character. Its logic was put succinctly by Lord Eldon in 1822 when he observed:[17]

> Truth is best discovered by powerful statements on both sides of the question.

However, the fairness and efficacy of the adversarial process presumes that all parties have equal access to legal and investigative resources - an assumption which cannot realistically be made in contemporary Australia.

There are a number of other problems with the adversarial process. It encourages parties to focus upon issues which they believe will provide them with forensic advantage, rather than the real issues in the case. It is economically inefficient because it requires every party to the proceedings to fully prepare each and every issue, no matter how contentious. Perhaps most significantly of all, in the context of 'the vanishing trial' and the dominance of mediation as a dispute resolution mechanism, the adversarial process is fundamentally antithetical to consensus building. There is a real tension between courts encouraging parties to prepare for a trial by maintaining partisan and aggressive positions which are likely to impede consensual resolution in a context in which resolution of the dispute by

[17] *Ex parte Lloyd* (1822) Mont 70, 72.

mediation is highly likely. In my view, we need to do a lot more work to resolve these tensions, including the encouragement of a less adversarial approach within the curial process. I accept that this is easier said than done, but the success of the 'conferencing' approach we are taking to many interlocutory issues in the Supreme Court of WA provides cause for optimism.

Proportionality

Most Australian courts have now embraced, in differing language, the notion of proportionality developed by Lord Woolf when his procedural reforms[18] were implemented in England and Wales in the last years of the last century.[19] The notion requires the court to assess whether the time and expense associated with any particular step is proportional to its contribution to the fairness and justice of the outcome. If the time and expense involved is disproportionate, the step will not be taken. This overarching principle is another means by which courts are endeavouring to reduce delay and cost.

Reduction of Interlocutory Disputes

Proportionality is one means of endeavouring to reduce interlocutory disputes which tend to consume considerably more time and money than their contribution to the justice of the outcome is worth. Another technique which we have found particularly useful in reducing interlocutory disputes is a requirement in our rules to the effect that the legal advisers of the parties must confer before bringing any interlocutory dispute before the court.[20] In this context we have construed conferral to mean a conversation - not conducted by the exchange of aggressive emails, but rather by

[18] Woolf, MR, *Access to Justice Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996).
[19] Primarily through the *Civil Procedure Act 1997* (C12) and *Civil Procedure Rules 1998* (SI 1998/3132).
[20] *Rules of the Supreme Court 1971* (WA) O 59 r 9(1).

telephone or ideally face to face, between lawyers who have the authority to resolve the dispute. When this rule was introduced, interlocutory disputes dropped almost overnight by about one-third.

Discovery

Perhaps ironically, much has been written about the burden and cost of discovery in the area of civil litigation. Most courts have moved away from a default position in which parties have a general obligation to discover all relevant documents. Techniques identifying more specific discovery obligations are still being developed and in a context in which most documentary data is stored electronically, there is cause for optimism that technology may come to the aid of these techniques.

Expert Evidence

Expert evidence has also proven to be a significant source of delay and expense. Various techniques have been introduced in different jurisdictions with a view to alleviating this problem, including more proactive judicial supervision of the process of gathering expert evidence. Court-directed expert conclaves are now very common. In our Court we have taken that process one step further by overseeing the process by which the expert evidence is gathered - commonly by a conference which will address:

- The issues to which the expert evidence is relevant;
- The appropriate areas of expertise;
- The questions to be asked of the expert witnesses;
- The facts which the experts can assume are not contentious: and
- The facts which are contentious.

Ideally, all these matters are either agreed, or at least the differing points of view clearly enunciated before the experts are engaged. In a large case, the expert conclaves may be facilitated by a Registrar of the Court, in the

absence of the lawyers for the parties, and the Registrar will oversee the production of the Joint Expert Report emerging from the conclave. These techniques reduce the risk which we have seen eventuate far too often, of the expert witnesses being like ships passing in the night, without knowledge of each other or any real engagement.

Other techniques commonly used to reduce costs and delay in this area include taking the evidence of expert witnesses concurrently (the so-called 'hot tub') and orders limiting the number of expert witnesses which parties may call.[21] The technique of requiring the parties to appoint a single expert in each field has had mixed success, and does not appear to have many champions.

Self-represented Litigants

The unaffordable cost of legal services to which I have referred has resulted in increasing numbers of self-represented litigants in all of Australia's courts. Their increasing prevalence is significant in two respects. First, if we are serious about improving access to justice, we should be equally serious about providing self-represented litigants with the information and resources which they need to navigate a complex process. The internet provides the capacity to make procedural information and court forms generally available, hopefully in terms which are easily understood.

The second dimension of the increasing prevalence of self-represented litigants is the burdens which they impose upon a court system which has been designed largely upon the assumption that parties will be legally represented. In this respect it is important to distinguish between, on the one hand, self-represented litigants who are querulous (or in the older terminology, vexatious), and whose impact is unlikely to be affected by improving the information generally available, and, on the other hand, the

[21] *Rules of the Supreme Court 1971* (WA) O 4A r 2(2)(ia), O 36A.

much larger group of well-intentioned litigants who wish to exercise their rights of access to Australia's civil courts but find it very difficult to do so without the benefit of legal assistance. The provision of greater information and assistance to litigants falling within the latter group would reduce the burden and the cost which they impose upon an already strained system. Again, the internet provides us with unprecedented opportunities in this regard.

Improving Access to Justice by Reducing Legal Costs

The cost of legal services is probably the most significant barrier to access to civil justice. In the last section I considered ways in which legal costs might be reduced by improving court efficiency. In this section I will address ways in which legal costs might be reduced more directly. One way of considering those issues is to first identify the drivers of legal costs.

The Drivers of Legal Cost

Perhaps the most significant driver of legal cost is the labour intensive nature of the work. The practice of law is very labour intensive and human resources in Australia are expensive. One way in which the extent of the work required might be reduced is through the improvements in court efficiency which I have mentioned. Other ways of reducing expensive professional time include greater use of paralegals, outsourcing legal research and data assembly to cheaper jurisdictions and using information technology to reduce the time and effort required to conduct legal research, prepare documents, communicate with other parties and courts, etc. Of course, utilisation of some of these techniques carries a risk of a reduction in the quality of the service provided. On the other hand, failure to utilise these techniques will keep the cost of legal services beyond the reach of many ordinary Australians. A balance may need to be struck between

quality of service and unaffordability, analogous to the balance which courts now strike in the application of the principle of proportionality.

Another way to reduce legal costs is by the provision of limited scope services, also referred to as the 'unbundling' of legal service provision. Costs will be reduced if a lawyer only undertakes the more complex work, whilst the client does the more straightforward work (legal or otherwise) themselves. Limited scope services are well established in the USA. In Australia, community legal services in Australia have been delivering unbundled services for many years. More recently, there has been increasing interest amongst the private sector. The keynote address at the 2017 National Access to Justice and Pro Bono Conference was delivered by Professor Sheldon Krantz, who advocated the development of 'low-bono' services in Australia, which 'offer greatly reduced fees and limited scope arrangements to those who are not impoverished but have limited means'.[22] The barriers to limited scope services include court rules which assume that solicitors are on the record for an entire matter (and would as such need to go off the record – or perhaps on and off repeatedly - if a client takes responsibility for particular steps); the need for careful thought in the terms of the retainer agreement; and the risk of professional liability claims.[23] However, those barriers are gradually being addressed and, in Western Australia, the Law Society has published guidelines for the unbundling of services and for limited scope retainers; and will next month be holding a professional development event on the topic.[24]

[22] Australian Pro Bono Centre, *Professor Sheldon Krantz: Seven Steps Towards Better Access to Justice* (Australian Pro Bono News, Issue 118, May 2017): <http://www.probonocentre.org.au/apbn/may-2017/seven-steps-towards-better-access-to-justice/> (accessed 26 February 2018).

[23] Castles M, *Expanding Justice Access in Australia: The Provision of Limited Scope Legal Services by the Private Profession* (2016) 41 *Alternative Law Journal* 117, 115-116.

[24] The Law Society of Western Australia, *Unbundling of Legal Services*: <https://www.lawsocietywa.asn.au/event/unbundling-legal-services/> (accessed 26 February 2018).

Time Billing

Another significant source of cost is the fact that most lawyers charge by reference to input costs rather than the value of outcomes - which is a polite way of referring to time billing. The debate with respect to the relative merits and demerits of time billing is beyond the scope of this paper.[25] Clients are generally charged by reference to the cost to the law firm providing the service, not by reference to the value of the service to them. That practice creates an economic incentive for lawyers to do more legal work and thereby generate more revenue. It also creates an economic incentive to involve more lawyers than might be absolutely necessary, and an incentive to take longer to perform the legal services. These economic tendencies are exaggerated by the common practice of setting fee targets by which employee and partner performance is measured and remunerated. These practices in turn contribute to a significant level of lawyer burnout within the profession, and a high attrition rate.

Clients are increasingly placing commercial pressure on legal service providers to provide alternative approaches to billing. These alternative approaches can be applied more readily to non-contentious legal work than to litigation because of the unpredictability of litigation. It is very difficult to estimate in advance the amount of legal time that will be required to bring a court case to conclusion, and therefore to estimate the cost of the services in advance. Those difficulties can be ameliorated to some extent by undertaking particular portions of the work for a fixed fee so that when a milestone is reached, and greater information is available about the case, an estimate can be made of the cost of providing the next portion of the work required. However, while this approach provides some advantage for the client, the fundamental disadvantage of not knowing how much the entire

[25] I have addressed this topic in *Billable Hours - Past Their Use-By Date*, 17 May 2010 available on Supreme Court of Western Australia website: <http://www.supremecourt.wa.gov.au/_files/Perth_Press_Club_Law_Week_20100517.pdf>.

case will cost at the outset remains unaddressed. There is also the risk that lawyers will add a margin for risk and uncertainty which in fact increases the cost to the client.

Duplication of Services

The costs generated by the duplication of services is a touchy subject upon which to address members of the Bar. Let me say at the outset that there are many cases in which the services of a solicitor augment and improve the efficiency of the services provided by a barrister to the overall benefit of the client. However, as one who hails from a profession which developed without a separate Bar until relatively recently, and which is still described as a fused profession, and having practised as a solicitor advocate for a number of years before joining the Bar, I can say from experience that there are also a number of cases in which efficiency is enhanced and cost reduced by the case being handled, from start to finish, by a single practitioner. Although I have been removed from legal practice for almost 12 years now, I sense that methods of practice are becoming more flexible in States with divided professions, like Queensland, in order to accommodate the interests of economic efficiency.

Duplication can also occur where there are a number of lawyers engaged within a firm, each doing the same work. Duplication also occurs through the process of 'file churning'. Every time a file moves from one lawyer in an office to another lawyer in the office, that lawyer has to familiarise himself/herself with the file and there is a real risk that the cost involved will be passed on to the client.

Market Regulation

Theoretically market regulation might be another contributor to costs because it might reduce competition and impede market entry which in turn might drive up price levels. However, that is a purely economic

perspective. The legal profession is regulated to protect consumers by ensuring the quality of the services provided by legal practitioners, not to reduce competition. The proliferation of law graduates and new entrants to the legal profession in recent years suggests that this contributor to cost may be more theoretical than real.

Information Asymmetry

Another contributor to the cost of legal services is what economists call 'information asymmetry' as between the consumer of a service and the provider of that service. The asymmetry occurs when the person acquiring the service does not have the level of information, knowledge and experience which they need to adequately negotiate with the provider of the service as to its real cost and/or value. So, for example, if one wishes to buy an electrical appliance, one can go to the various retailers, look at the comparable appliances, compare the cost of the desired appliance in one store as compared to the cost in another store, and compare the relative features of the different appliances competing for your custom.

It is very difficult for the consumers of legal services to undertake a similar process of evaluation because they do not know what the legal services are like; they do not know the nature or quality of the services which are required; they do not know the size of the job that they want done; and they do not know what the total price of the services will be. Clients will tell you that comparing lawyers by reference to hourly rates is a notoriously unreliable guide to predicting the total cost likely to be incurred, because of differences in the hours that will be billed by different service providers in order to achieve a particular outcome.

For these reasons, clients have very limited capacity to make meaningful comparisons between prospective service providers or to negotiate meaningfully with respect to the cost of the services to be provided.

Overheads

Other significant contributors to legal costs include high overhead costs for legal practices. Staff wages, information technology and rent can all be significant expenses, even if the practice is not conducted in a glamorous office in the upper level of a building with a marble foyer.

How do we reduce these costs?

The contributors to legal costs which I have identified suggest that ways in which we might reduce legal costs include:

- reducing the amount of legal work required in a particular case, and perhaps by greater use of information technology or sharing the work with paralegals or outsourcing some of the work;
- providing limited scope legal services;
- reduced reliance on time billing and greater use of fixed costs;
- reducing duplication of work;
- improving the symmetry of the information available to consumers and service providers; and
- reducing overheads.

<u>Information Technology</u>

Information technology has the capacity to significantly improve access to justice. Some of the ways I have already mentioned include:

- the provision of greater information to potential parties to a dispute, reducing the prospects of a dispute arising;
- once a dispute does arise, providing information to parties to that dispute as to the less formal mechanisms that may be available for the resolution of their dispute;
- by providing online dispute resolution mechanisms - perhaps through a chat room;

- by providing information to self-represented litigants with respect to court practice and procedure;
- by facilitating the lodgement of court forms through electronic lodgement.

Other more innovative ways in which technology might be used include the emergence of online legal services which enable lawyers to respond to the client's need. One of those services involves a website called Rocket Legal.[26] A prospective client is able to post his or her problem on the internet, and lawyers can then respond to the posting and offer to provide services with respect to the problem which can then be evaluated by the client.

Information technology might also be utilised to address the problem of information asymmetry to which I have referred. Most, if not all, of you will be familiar with Trip Advisor. Before booking a hotel or a restaurant, we can use that site to obtain information about other people's views of the service we are considering acquiring. Perhaps similar information could be provided in respect of legal services. Defamation is certainly an issue that would have to be addressed, but if there is a reasonable basis for the view expressed, that prospect should not be an unsurmountable problem. Trip Advisor seems to have got around that issue in relation to restaurants and hotels.

It also appears to me to be quite conceivable that a wide range of legal services could be provided in a virtual environment, rather than an office environment, reducing or perhaps eliminating the cost of rent and enabling people to work at home, thereby avoiding travel time.

Online portals might also provide an efficient way of providing information to people with a particular problem - especially people in regional and

[26] Rocket Legal, <https://www.rocketlawyer.com/?stickyTrack=3wBJWkGU> (accessed 26 February 2018).

remote areas who have very real practical difficulties in obtaining direct access to legal services.

Social media such as Facebook, Twitter and LinkedIn provide very effective mechanisms for the delivery of information to a broad audience. Those mechanisms can be used to provide information to people who may become involved in legal disputes. Public video services, like YouTube, offer similar opportunities. Legal apps have also emerged in recent years[27] and are particularly useful in communicating with young people who tend to use smartphones and tablets rather than desktops and laptops.[28]

The potential use and impact of computational law systems or artificial intelligence was addressed in detail by Justice Geoffrey Nettle as the keynote speaker at this conference two years ago.[29] I will not go over that ground again, but will briefly mention some recent developments in relation to online ADR (ODR) and an online court.

Internet based ADR is now well developed in other jurisdictions. The internet based system offered by eBay for the resolution of disputes between vendors and purchasers facilitates the resolution of around 60 million such disputes each year.[30] Such techniques and software have now been applied in a variety of areas and are being applied in the Civil Resolution Tribunal in Canada,[31] and will be part of the Online Solutions Court which is soon to be implemented in the UK for claims up to £25,000

[27] For example, both Victoria Legal Aid and the Legal Services Commission of South Australia have developed specific apps.
[28] Commonwealth Attorney General's Department, *Harnessing the Benefits of Technology to Improve Access to Justice* (Analysis Paper, 2012).
[29] Justice Geoffrey Nettle, *Technology and the Law* (27 February 2016).
[30] Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) 11 [4.2] <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> (accessed 26 February 2018).
[31] Civil Resolution Tribunal, < https://civilresolutionbc.ca/about-the-crt/the-crt-team/> (accessed 26 February 2018).

in value.[32] This is a very significant development as it incorporates a staged system which focuses initially upon online ADR systems, but in the event that they do not resolve the dispute, defaults to online adjudication.[33] Programmes have also been developed in Canada and are being developed in Australia in relation to landlord and tenant disputes which will enable online resolution of those disputes.

ABS 2016 statistics show that 85% of people were internet users - that is persons aged 15 years and over who accessed the internet for personal use in a typical week[34] - so technology has the potential to greatly enhance access to justice. However, perhaps the greatest concern about digitalisation of legal and court processes relates to those who have no access or are unable to use the internet.[35] In preparing for the digitalisation of Court processes and the implementation of the Online Solution Court in the UK, it was found that 52% of both claimants and defendants would require assistance to use the on-line system, and that 17% of claimants and 23% of defendants would be 'digitally- excluded'- that is, unable to use the online system even with assistance.[36] In implementing any new legal or court technology it is important to find bespoke strategies to alleviate the concerns about these populations. For example, in the UK Online Solution Court, the 'digital with assistance' population will be provided with telephone support; clear and concise guidance documentation; signposting

[32] As a result of the recommendations by Lord Justice Briggs, *Civil Courts Structure Review: Final Repor*t (27 July 2016) < https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/> (accessed 26 February 2018).
[33] Ibid.
[34] Australian Bureau of Statistics, *8146.0 - Household Use of Information Technology, Australia 2014-2015* (18 February 2016) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/8146.0> (accessed 26 February 2018).
[35] Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (27 July 2016) [6.5.2], [6.11]-[6.21] <https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/> (accessed 26 February 2018).
[36] Civil Procedure Rule Committee, *Minutes of Meeting* (5 May 2017) Item 10 [26], [27] <https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I1b4d13bf55bf11e79bef99c0ee06c731.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=de59719c-bcb9-4e6a-b886-97cfa0a303ff&contextData=(sc.DocLink)&comp=pluk> (accessed 26 February 2018).

to additional third party support bodies; and, where required, face-to-face assistance. In line with current procedure, the 'digitally excluded' will be signposted to the existing paper service.

Summary and Conclusion

Barriers to access to civil justice are not new. They are complex and multifaceted. Although we have made some progress in overcoming some of the barriers, there remains much to be done. Although it is unrealistic to suppose that we will ever live in a country in which each and every member of our community can invoke the civil justice system whenever they wish, and probably undesirable that we should ever get to that point, the developments that I have endeavoured to address in this paper, including in particular the opportunities offered by information technology, give rise to cautious optimism that more Australians might obtain meaningful access to justice than ever before.